

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

United States Court of Appeals
for the Second Circuit

Docket No. 77-1330

United States of America

FEB 2 1978

v.

Alfred Lewis,

Defendant-Appellant

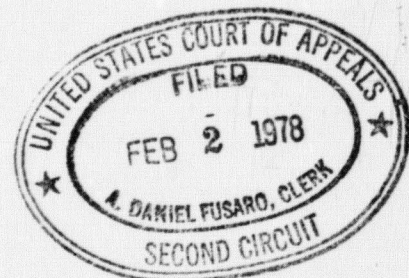
APPELLANT'S REPLY BRIEF

B
e/s

On Appeal from the United States District
Court for the Southern District of New York

Submitted by:

Alfred Lewis,
Defendant-Appellant,
Pro se



The appellee's brief was received by the appellant on January 24, 1978 — five days after the date fixed by Judge Kaufman's scheduling order of November 20, 1977.

The appellee's brief refers to certain things as being reflected in the trial and other records that are neither in accord with the copies of the records made available to the appellant, nor with the facts as the appellant set them out in his brief based on these records, or even as the appellant recalls those facts. They include but are not limited to the following:

1. At page 7 of his brief the appellee refers to the trial record transcript as indicating at page 265 that the defendant testified that Susan Brewer viewed the defendant and said "Yeah, that looks like him." The certified copy of the transcript provided the appellant reflects the matter as follows:

"***People came—you know, people was looking through there and was saying, "Yeah, that's him!"

I couldn't see exactly who they were, but they were looking in because as I recall that thing had a window there on one side with a wire mesh accross it and it was hard to see, you know, who was out there, but I could hear them talking out there and they were saying, "Yeah, that looks like him."

* * *

A I heard a woman's voice, and it probably was the same woman who testified here, Mrs. Brewer. "

2. At page 10-11 of his brief appellee has the record of 4/4/77 (suppression hearing) at page 14-15 reflecting that Officer Cowles told the defendant to get out of the taxicab, but the defendant did not respond, remaining in the cab with his hand in the right-hand pocket of his coat. The certified copy of the transcript

provided the appellant reflects the matter as follows:

"A I pulled open the rear door of the taxi with the defendant in the rear seat, identified myself, told him not to move, that I would shoot.

Q You say you identified yourself. What did you say?

A I said, "Please don't move or I'll shoot."

Q What did the man in the rear of the taxi do?

A The man in the taxi was just sitting there. He had one hand in his right raincoat pocket, his other hand was on his leg outside the pocket.

I repeated myself again to remove his hand from his coat pocket.

I should say I stated to him to remove his hand from his pocket.

He hesitated.*

I said, "Take it out right now or I'll shoot you."

The man slowly took his hand from the raincoat pocket.

Q Was there anything in his hand when he took it out?

A No, there wasn't.

Q Then what happened?

A I asked the man to step out of the taxi, which he did."

3. At pages 11 and 13(second paragraph and footnote) the appellee indicates without stating transcript page numbers that the record reflects that Officer Cowles had been informed by the tipster Carnival that the defendant was armed and had just left the scene of an accident. The certified copies of the transcripts provided appellant reflect the matter as follows and in no different way anywhere in the transcript(page 11-12, transcript of 4/4/77 [suppression hearing]):

"***And he leaned out and he said, "Are you a police officer?"

I stated I was.

* Hesitation here, incidentally, would be the normal response for anyone in these circumstances; ordered first not to move or be shot, then to remove his hand from his pocket or be shot. Moreover, a person with a gun pointed at him does not as a general rule want to make a quick move that could be misinterpreted. This situation is in no way analogous to that in the case of Adams v. Williams, 407 U.S. 143, where the subject disobeyed an ordinary non-gunpoint order to open the car door or alight from the vehicle and instead rolled the window down.

He said, "Well, the cab we have been following right in front of me has a man in the rear seat with a gun."

I said, "Wait a minute. Repeat yourself again."

The man in the rear seat repeated himself. He said, "The man in the cab he has been following has a gun, he just hit my car." "

Page 119, trial transcript:

"I asked the man in the cab—I said, "Would you please repeat yourself."

He said, "Look, I am following a cab right in front of me. The man in the rear seat has a gun. He just hit my car."

With that his cab pulled away. I took off in pursuit of the yellow taxi which had the man in the rear seat with the gun."*

As pointed out in the appellant's brief at 23, 23(a) and 24, and in Point 8, prior to the trial of the case, to wit, on February 15, 1977 the defendant unsuccessfully moved the court to order the replacement of prosecutor T. Barry Kingham with another prosecutor for the reasons given in the record as quoted below (proceedings of February 15, 1977, p.p. 6-8; Record on Appeal, Doc. No. 7):

"THE DEFENDANT: Your Honor, as I understand it, Mr. Kingham descends from a supervisory position in the U.S. Attorney's office to prosecute this case. I was charged in a case in 1974 in this court, in this district and Mr. Kingham prosecuted that case. The outcome indicates that I was acquitted. Throughout the course of the case, prior to the acquittal, there was a question as to the propriety of Mr. Kingham's action in the case. He expressed[sic., should read suppressed] much evidence as

* Incidentally, as pointed out in the appellant's brief at page 28[footnote], the man could have been in law enforcement or the military, or employed fulfilling defense contracts, or licensed to carry a gun. Section 265.20 of the New York Penal Law excepts the above category of people from the laws prohibiting possession of firearms. Additionally, as pointed out in the appellant's brief, the man could have been a hunter or trap shooter, or his gun might have been a completely legal-for-everyone air rifle or air pistol, or a toy gun as the tipster never specified the kind. Indeed, he could not specify the kind because he never saw a gun actually. Among other infirmities, the tip was not one not founded on speculation. Spinilli v. United States, 393 U.S. 410, 416.

he saw the case beginning to fold prior to the ultimate outcome. There were many things that he didn't come up with on discovery, that he was supposed to come up with and there was some evidence that was changed in character that Mr. Kingham had in his possession. There were minutes in the case that were altered from the time of the hearing, the first hearing that took place, until the time of the trial. Those particular portions of alterations were just the portion changed by the police witnesses when they testified on the trial.

THE COURT: What do you mean they were altered?

THE DEFENDANT: The minutes were incorrectly reported.

THE COURT: By a court reporter in this case?

THE DEFENDANT: Yes. It was just these portions of the minutes and the testimony of the witnesses at the trial that their testimony was shaded in another direction.

This could only have been done under Mr. Kingham's direction. When I was arrested in this case, an FBI man that testified in another case[sic. should read the other case] came into the room that I was in and he says, he was surprised to see me. He says, "Oh, Barry, will want to get the news that you were arrested in this case. I am going to give him a call."

He left the room and came back again and he said that he called Barry Kingham, that he wants this case. He will be happy to get this case. After that when I was brought for the arraignment, there was another prosecutor that appeared at the arraignment, but he said that he was handling it temporarily because Mr. Kingham is going to handle the case or Barry is going to handle the case. On the last appearance when I pleaded not guilty to the indictment, another U.S. Attorney appeared and he also said that Barry Kingham was going to handle the case.

Your Honor, I don't think it is right that this U.S. Attorney that handled the case with all the abuses that took place in the last case should be sent[sic., should read should descend], from what I understand to be a supervisory position, in a vendetta fashion to handle this case.

In his effort to get a conviction because he feels that he lost the prior case and he wants to win this case because of some personal feeling or something like that can lead many things to happen, many abuses could occur that wouldn't come to the attention of either me or ~~the~~ my attorney or the Court. I think another U.S. Attorney should be assigned to this case."

The actions of Mr. Kingham in this case—the use of surprise evidence that differed substantially from that which the government

stated in its discovery revelations would be offered, signs of a coordinated pattern of perjury by the law enforcement people who testified substantially that they all heard the ~~XXXXXXXXXXXX~~ same things and didn't hear the same things over police radio which phenomenon is probably astronomically improbable without a coordinated effort, signs of signaling of the witnesses by the prosecutor during their testimony — developed almost exactly in accordance with the fears expressed by the defendant prior to the trial in ~~XXXX~~ his effort to substitute Mr. Kingham with another prosecutor.

Wherefore this conviction must be reversed upon the grounds of the use of evidence secured in an illegal arrest and search in violation of the Fourth Amendment of the United States Constitution, and for the further reasons stated in each and every one of the other points raised in the appellants brief.

Respectfully submitted,

Alfred Lewis,
Appellant,
Pro se

U.S.A. v. Alfred Lewis

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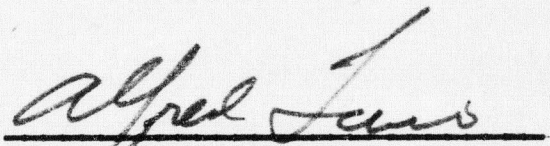
Certification of Service

I, Alfred Lewis, certify that today I mailed a copy of the accompanying appellant's reply brief to the appellee by first class mail in an envelope addressed thusly:

United States Attorney, Southern District of New York
One St. Andrews Plaza, New York, New York 10007

I, Alfred Lewis, under penalty of perjury, swear the foregoing statements to be true.

Dated: Atlanta Ga.,
Jan. 27, ~~1977~~ 1978



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